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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-5084

- -X

EDDIE SPRAGGINS,
Petitioner,

-against-

WALTER D. ZANT, Warden,
Respondent.

- -X

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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July 16, 1982

QUESTIONS PRESENTED

1. Whether the resentencing jury's consideration of an aggravating circumstance which was not established in the first trial violated the Fifth Amendment's ban against double jeopardy?

2. Whether petitioner was denied due process of law when the prosecution was permitted to submit proof to the jury on the existence of an additional aggravating circumstance?

3. Whether the jury's consideration of inflamatory evidence without the guidance of judicial standards deprived petitioner of the prescribed sentencing procedure recognized in Gregg to be required by the Eighth and Fourteenth Amendment?

4. Whether the automatic appellate review provided by Georgia's statute was adequate to ensure against the random, arbitrary and unconstitutional imposition of the death penalty?

5. Whether the fact that no jury ever sentenced petitioner on the basis of a statutory aggravating circumstance that was so clearly defined as to neutralize subjective inflamation of the jurors, violated petitioner's Sixth Amendment right?

6. Whether distribution to the resentencing jury of a written copy of a jury charge identical to the defective charge at petitioner's first sentencing violated his Sixth, Eighth, and Fourteenth Amendment rights?

7. Whether petitioner was denied his Sixth Amendment right to effective assistance of counsel at both trials and on appeal?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner Eddie Spraggins ("petitioner") prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia affirming the denial by the Butts County Superior Court of his petition for a writ of habeas corpus.

OPINION BELOW

The opinion of the Supreme Court of Georgia, a one sentence order, is not yet officially reported and is annexed as Appendix A. The opinion of the Superior Court of Butts County, not yet officially reported, is attached as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 17, 1982. No motion for rehearing was filed. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This cause involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, set forth in Appendix C.

2. This cause also involves the following constitutional provisions and statutes of the State of Georgia included in Appendix C hereto: GA. CONST. Art. 1 §§20-101, 2-111; Ga. Code Ann. §§27-2206; 27-2503; 27-2534.1, 27-2537.

STATEMENT OF FACTS

Petitioner is a 34 year old man. He is functionally illiterate and his intellectual range has been diagnosed as that of mild mental retardation.

On March 1 and 2, 1977, petitioner was tried and found guilty of the rape and murder of Francis Coe, a fifty-five year-old neighbor, on January 31, 1977. Petitioner was sentenced to death for the murder based upon the jury's finding of the existence of a statutory aggravating circumstance, rape. Ga. Code Ann. §27-2534.1.

On appeal of the conviction and sentence to the Supreme Court of Georgia, that Court, on February 31, 1978, affirmed the convictions for murder and rape, but reversed as to the death sentence for murder (Appendix D). Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978) (hereinafter "Spraggins I"). The grounds of the reversal were that:

> The [trial] court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (Fleming v. State, 240 Ga. 142(7)), 240 S.E.2d 37 (1977), and failed to inform that jury that they

were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§27-2534.1(b) and 27-2534.1(c), Hawes v. State, 240 S.E.2d 833 (1977).

243 S.E.2d at 23.

The retrial of the sentencing portion of petitioner's case occurred on May 22, 1978. At that trial, the prosecutor, seeking the death penalty, attempted to demonstrate the existence of two aggravating circumstances (Tr.-2 at 74-75).* The first aggravating circumstance with which the prosecution was concerned was the rape of the victim; the second aggravating circumstance, about which the jury in the first trial was not charged at all, was that the murder was "vile, horrible, and inhuman in that it involved torture, depravity of mind or an aggravated battery." (Tr.-2 at 75).

The direct evidence presented by the prosecution dwelled on the mutilated state of the victim's body and was heavily constituted by oral description or authentication of photographs of the body, subsequently admitted into evidence.**

At the close of the evidence and summation, the jury was charged orally and in writing. The oral charge

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* Throughout the petition, references to the transcript of the lower court in the 1978 trial will be designated as ("Tr.-2 at _____)". References to the lower court in the 1977 trial will be designated as ("Tr. 1 at _____)".

** The prosectution called ten witnesses. Six of those witnesses, whose direct testimony constituted about forty-eight pages of transcript out of a total of approximately fifty-six pages of prosecution witnesses' direct testimony, either authenticated photographs taken of the body or orally described the conditions of the body. Highly detailed descriptions of wounds were given by both the chief investigator, Bert Davis (Tr.-2 at 130-131) and the coroner, Dr. Byron Dawson (Tr.-2 at 174-178).

determining a sentence, they were authorized to consider all circumstances in aggravation or mitigation. They were informed that they should look for specific statutory aggravating circumstances suggested by the evidence and that the presence of such circumstances could warrant a sentence of death. The judge also instructed that even if aggravating circumstances existed, a life sentence could be recommended.

The written charge (Appendix F, hereto) was presented to the jury in this way:

> "Now, ladies and gentlemen of the jury a list of those aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you [the jury] in the jury room during your deliberation."

(Tr.-2 at 298). This document, entitled "Punishment Charge", did not instruct the jury that they were authorized to consider mitigating circumsntaces and did not say that even if aggravating circumstances were present, a life sentence could be imposed.

After deliberation, the jury returned with a sentence recommending death. Petitioner appealed the death sentence to the Supreme Court of Georgia, where the sentence was affirmed (Appendix D); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979) (hereinafter, "Spraggins II"). Petitioner's initial writ of certiorari was granted and remanded for review in light of Godfrey v. Georgia, 446 U.S.420 (1980). Spraggins v. Georgia, 446 U.S. 961 (1980).

Petitioner filed a timely written motion for full briefing and oral argument on July 1, 1980. This motion was denied and the Georgia Supreme Court reimposed the death

sentence on September 24, 1980. Spraggins v. State, 246 Ga. 432, 271 S.E.2d 828 (1980).

A second petition for writ of certiorari was filed in the Supreme Court of the United States on November 23, 1980. This petition was denied, with Justices Marshall and Brennan dissenting on both Eighth Amendment and Godrey, supra, grounds. Spraggins v. Georgia, 451 U.S. 910 (1981). The Supreme Court of the United States further denied petitioner's timely filed motion for rehearing. Spraggins v. Georgia, 452 U.S. 932 (1981).

On July 22, 1981, The Superior Court of Meriwether County held a resentencing hearing, and set petitioner's execution for August 3, 1981. A stay of execution was ordered on July 30, 1981 to allow the petitioner to file a petition for writ of habeas corpus.

The Superior Court of Butts County denied the petition for writ of habeas corpus on January 4, 1982. The Supreme Court of Georgia denied petitioner's appeal.

HOW THE FEDERAL QUESTIONS WERE RAISED

The substantial federal questions described were properly raised during a series of state court proceedings. See, e.g., Spraggins I, 240 Ga. 759, 243 S.E. 2d 20 (1978); Spraggins II, 243 Ga. 73, 252 S.E. 2d 620 (1979). Although the Georgia Supreme Court denied appeal, the Superior Court of Butts County considered the following federal constitutional questions:

1. Whether the submission of a statutory aggravating circumstance at the resentencing trial, which was not

submitted at the initial sentencing trial, violated federal constitutional standards respecting double jeopardy and due process of law. The Superior Court explicitly considered and decided these issues. See Appendix B at 5-7.

2. Whether the Georgia statute failed to insure against a capricious and arbitrary determination in the petitioner's sentencing. This Court explicitly put the Georgia Supreme Court on notice that the seventh aggravating circumstance in the state's capital sentencing scheme (Ga. Code Ann. §27-2534.1 (b)(7)) may be unconstitutional for lack of definition, Greg v. Georgia, 428 U.S. 153, 201 (1976). The Georgia Supreme Court, upholding the jury, presumably found the statute constitutional. Spraggins II, 243 Ga. 73, 252 S.E. 2d 620 (1979). The Superior Court's reliance upon these decisions therefore, included a federal constitutional dimension.

3. Whether the sentencing instructions, as provided for in Ga. Code Ann. 27-2534.1(b), were subject to defects as to prevent the jury's consideration of mitigating circumstances. Although no specific reference to federal law was made in this determination, the Superior Court relied upon the holding in Spraggins II, 243 Ga. 73, 252 S.E. 2d 620 (1979), in its decision. The Georgia Supreme Court, in reviewing the sentence instructions, followed the reasoning in Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977) and Hawes v. State, 247 Ga. 327(9), whose foundations are explicitly and indissolubly welded to constitutional principles and decisions articulated by this Court. The Superior Court's determination, simply citing the Spraggins II decision, necessarily involved a matter of federal law.

4. Whether failure of counsel to provide effective assistance violated constitutional guarantees. The Superior Court explicitly recognized the federal constitutional dimension of this question. See Appendix B at 4-5.

REASONS FOR GRANTING THE WRIT

This Court has recognized the unique and awesome nature of the State's power to determine whether a human life should be taken or spared. Because of the absolute and irreversible impact of this determination, this Court has mandated that the death penalty may be constitutionally imposed only under procedures that ensure that the state's power to decree death is not wantonly and capriciously exercised.

Petitioner was denied the protection of those procedural safeguards declared by this Court to be constitutionally required. The sentence of death, imposed by a jury that: was permitted to sentence on a ground neither raised nor established in the first sentencing hearing; was improperly instructed; and was undirected by an adequately defined statutory standard, constitutes cruel and unusual punishment. Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated in these proceedings.

1. PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF THE FIFTH AMENDMENT BAN AGAINST DOUBLE JEOPARDY AND IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW

At the resentencing trial, the State introduced a second aggravating circumstance which was neither pursued nor found in the first trial of the petitioner. This

second aggravating circumstance was the sole aggravating circumstance found by the jury in the resentencing trial of the petitioner.

Under Georgia law the judge at the presentencing hearing is required to instruct the jury to consider any of the statutory aggravating circumstances which may be supported by the evidence. Ga. Code Ann. §27-2534.1(b) and (c). Georgia law also provides "that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible" at the presentencing hearing. Ga. Code Ann. §27-2503(a) (emphasis added). In petitioner's first sentencing hearing the judge instructed the jury that it could sentence petitioner to death if it found that the murder was committed while the defendant was engaged in the commission of the capital offense of rape. This is the only statutory aggravating circumstance which the judge instructed the jury to consider, see Ga. Code Ann. Section 27-2534.1(b); the Georgia Supreme Court held that "(t)his was the only aggravating circumstance as to which the defendant had been put on notice." Spraggins I, 243 S.E.2d 20, 23 (1978) (citing Ga. Code Ann. §27-2503).

Following the Georgia Supreme Court's decision setting aside the death sentence and ordering a new sentencing trial the prosecution submitted its sentencing case to the second jury on the theory that two aggravating circumstances were present in the case--the one that was charged in the first trial and the additional circumstance that the murder was outrageouly or wantonly vile, horrible or inhuman. See Ga. Code Ann. §27-2534.1(b)(7). This second jury based its

decision to impose the death sentence on its finding beyond a reasonable doubt that "(t)he offense of murder was outrageous, wanton, vile and horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, and aggravated battery to the victim." (Tr.-2 at 304). See Ga. Code Ann. §27-2534.1(b)(7) and (c). The second sentencing jury did not find that the murder was committed while the offender was engaged in the commission of rape.

This court has recognized that "(e)ven if the first trial is not completed, a second prosecution may be grossly unfair" because successive prosecutions increase the emotional burden on the defendant and may significantly enhance the risk of conviction by allowing the prosecution to refine its proof. Arizona v. Washington, 434 U.S. 497, 503-504, and note 14 (1978). "Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Id. at 505. Although the issue at the second trial was punishment, not guilt, petitioner was, plainly, placed in jeopardy of life. Had the second jury been limited to consideration of the statutory aggravating circumstance charged in the first trial, it could not have sentenced petitioner to death on the basis of its stated findings.

Petitioner submits that it was a violation of the Fifth Amendment's ban against double jeopardy for the prosecution to present its sentencing case to the second jury based on a statutory aggravating circumstance that had not been established by the evidence in the first

sentencing trial. If the evidence presented at the first sentencing hearing was inadequate to require the judge to charge the jury on the additional aggravating circumstance, the prosecution should not be entitled to a second chance to prove beyond a reasonable doubt the existence of this aggravating factor. See Bullington v. Missouri, 451 U.S. 430 (1981). By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, the State explicitly requires the jury to determine whether the prosecution has "proved its case." Id. at 444. The State received "one fair opportunity to offer whatever proof it could assemble;" it is not entitled to another. Id. at 446. See generally Burks v. United States, 437 U.S. 1 (1977); Price v. Georgia, 398 U.S. 323 (1970); Green v. United States, 355 U.S. 184 (1957).

Petitioner also submits that the proceedings in which he was sentenced to death were fundamentally unfair and denied him due process of law. The prosecution gained an unfair advantage through the opportunity to present its case to a second jury with an additional theory to support imposition of the death sentence. It is not possible to be certain that the second jury's decision to impose death was not the result of its focusing on which of the circumstances was proved by the evidence rather than on whether either was proved beyond a reasonable doubt. See generally Price v. Georgia, 398 U.S. at 331. Prejudice to petitioner is indicated by the second jury's imposition of the death sentence on the broad and undefined circumstance, rather than on the narrowly defined circumstance that served as the basis for the first death sentence.

Finally, the second sentencing trial denied petitioner the procedural protection due a defendant in a death penalty case under Georgia law. As the Georgia Supreme Court recognized in petitioner's first appeal, the only aggravating circumstance as to which petitioner had been put on notice, as required by State law, was that charged in the first trial. Spraggins I, 243 S.E.2d at 23; see Ga. Code Ann. §§27-2503, 27-2534.1(b). Because the notice to which petitioner is entitled must precede his trial, no subsequent notice was adequate, under established procedure, to permit the prosecution to expand its case. Ga. Code Ann. §27-2503; Moss v. Georgia, 144 Ga. App. 226, 240 S.E.2d 773 (Ct. App. 1977). The jury's decision to impose the death penalty was, therefore, unlawful.

2. THE GEORGIA STATUTE, AS APPLIED IN THIS CASE, DID NOT INSURE AGAINST A CAPRICIOUS AND ARBITRARY DETERMINATION RESPECTING PETITIONER'S SENTENCE.

A. The Sentencing Jury Considered Irrevelant, Prejudicial and Inflammatory Information Without the Guidance of Clear Judicial Standards.

In Gregg v. Georgia, 428 U.S. 153 (1976), this court emphasized that when a human life is at stake there is a critical need to provide a jury with guidance and to ensure that relevant information is properly considered while irrevelant prejudicial information is excluded:

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. at 189.

The Court cautioned that "the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury;" the jury must be given guidance and direction in reaching its determination. Gregg v. Georgia, 428 U.S. at 192.

Petitioner was sentenced to death in proceedings that wholly failed to satisfy the concerns voiced in Furman v. Georgia, 408 U.S. 238 (1972) and Gregg, thereby creating a grave risk that the sentence was imposed in an arbitrary and capricious manner. The jury that sentenced petitioner was permitted to consider inflammatory evidence, and improper, prejudicial statements, without any standards to limit or direct its use of this information. Over the objection of defense counsel, the sentencing court allowed the prosecution to introduce into evidence and to display to the jury several photographs that graphically depicted the wounds suffered by the victim. (Tr.-2 at 133-134, 196-200). There was extensive testimony in the record as to the nature of the crime and the condition of the body (Tr. -2 at 131-132). The pictures were, therefore, not necessary to depict the crime and could serve no legitimate purpose. Rather, they could have served only to evoke feelings of revulsion and contempt in jurors unaccustomed to the spectacle of murder victims. The introduction of this evidence created a significant danger that the jury would be unduly prejudiced and incapable of reaching a reasoned decision.

Of further prejudicial impact were various comments and statements made by the prosecutor. Mr. Lee examined the petitioner on the issue of prior convictions as follows:

> Q. So you are kind of guy who goes to trial when you are not guilty but gets found guilty, isn't that right?
>
> A. Yes, but if you can recall in this case right here they never give me no chance to say whether I was or wasn't.
>
> Q. But you were found guilty?
>
> A. They gave me a year.
>
> Q. You didn't serve a year, did you?
>
> A. I would have.
>
> Q. They cut you loose--how long did you serve?
>
> A. Four months.
>
> Q. Four months isn't a year, is it?
>
> A. Well, that ain't my fault.
>
> Q. They always turn you loose, don't they, when you go in?
>
> A. They never have turned me loose every time I was up there. I done my time.

(Tr.-2 at 242-243). The prosecutor's questions undoubtedly served the intended purpose -- to alert the jury to the possibility that unless executed, petitioner would be "cut loose." Not only was the implication unwarranted, Georgia law specifically prohibits the prosecutor from making this argument to the jury. Ga. Code Ann. §27-2206 (1978). In further disregard of this prohibition, the prosecutor stated in his closing argument:

> He has been in jail so many times he can't even remember the number of them. Every time he

> gets out and goes and does something else. You want that to happen here? How would you feel being at your house one night looking out your window and seeing Eddie Spraggins walking up to your front door? If that wouldn't make cold terror run through your heart, I want to know what would. This man needs to be put where he can't do anything to anybody else again and the only way, the only way to be sure of that is recommend the death penalty.

(Tr.-2 at 281-282). At this point defense counsel moved for a mistrial. The trial court denied the motion, instructing the jury not to consider whether the defendant would be considered for parole. Obviously, the effect of this admonition must be assumed to have been negligible.

The impact of the prosecutor's statements, in conjunction with the introduction of the inflammatory pictures, was to arouse the jury's fear and prejudice. This appeal to the juror's sense of terror and outrage prevented a reasoned determination, based on relevant evidence and considerations.

The risk of an arbitrary and capricious decision was, thus, extremely grave; this risk was augumented by the judge's failure to provide the jury with standards to guide its use of the information relevant to the imposition of the sentence. The judge instructed the jury on the use of the evidence as follows:

> In reaching your determination, you are authorized to consider all of the evidence received by you in open court.
>
> You are authorized to consider all the facts and circumstances of the case.

(Tr.-2 at 296). The judge's abandonment of his duty to provide guidance left the jury free to exercise its unbridled discretion in sentencing petitioner to death.

B. Automatic Sentence Review by the Supreme Court of Georgia was Inadequate to Protect Against the Capricious, Arbitrary and Unconstitutional Imposition of Petitioner's Death Sentence.

In upholding Georgia's death penalty statute in Gregg, this Court focused on the automatic appeal to the Georgia Supreme Court as an important additional safeguard against the arbitrary and capricious imposition of the death penalty. 428 U.S. at 198, 204-206. Reliance on the automatic review process is misplaced; the Georgia Supreme Court's review of petitioner's death sentence did not and could not ensure that jury discretion was controlled by clear and objective standards so as to eliminate the risks of arbitrary and capricious action.

Because the statutory aggravating circumstance found by the jury is hopelessly vague, there could be no meaningful review to determine whether the evidence supported the jury's finding, as is required by statute. Ga. Code Ann. §27-2537(c)(2). The court's opinion, predictably, failed to elaborate on its conclusion that the jury's finding was supported by the evidence. Spraggins II, 252 S.E.2d at 622.

The court is also required under the sentence review statute to consider whether the sentence was imposed under the influence of passion or prejudice. Ga. Code Ann. §27-2537(c)(1). In one conclusory statement, without the basis for its conclusion, the Georgia Supreme Court dismissed this possibility. 252 S.E.2d at 622.

The court's citation to similar cases in which the death penalty was imposed to support its imposition in this

case is of no value in protecting against its random use. The cases cited by the court are similar in that they involve murder convictions; however, presumably in any case in which the defendant is convicted of murder the cases cited would support imposition of a death sentence. See id. at 623.

It is apparent from the summary nature of the Georgia Supreme Court's opinion in this case, that the automatic review afforded a defendant under this statute provides only the illusion of protection against arbitrary and capricious imposition of the death penalty.

3. NO JURY HAS EVER VOTED TO SENTENCE PETITIONER ON THE BASIS OF A CLEARLY DEFINED STATUTORY AGGRAVATING CIRCUMSTANCE, THEREFORE DEPRIVING HIM OF HIS SIXTH AMENDMENT RIGHTS

A. The Georgia Supreme Court Improperly Acted as a Sentencing Agent by Reimposing the Death Sentence After Redefining the Statute.

With respect to petitioner's first petition for a writ of certiorari, this Court remanded his case "for further consideration in light of Godfrey v. Georgia", 446 U.S. 420 (1980), but did not instruct the Georgia Supreme Court to put the matter before a newly convened sentencing jury. Mr. Justice Marshall's concurrence in Godfrey did suggest that a trial jury should be called:

> "[I]t is not enough for a reviewing court to apply a narrowing construction to otherwise ambigious statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channelled and guided by clear, objective, any specific standards."

Godfrey v. Georgia, 446 U.S. at 436 (emphasis in original). Mr. Justice Stewart's opinion for the Godfrey plurality, on

the other hand, could be read to imply -- though it did not hold* -- that if "the Georgia Supreme Court can be said to have applied a constitutional construction" of subsection (b)(7), Godfrey v. Georgia, 446 U.S. at 428, any deficiency at the trial jury level could be overcome.

On remand in this case, the Georgia Supreme Court, sua sponte decided against convening a new sentencing jury and further refused to take briefs or oral argument on any matter regarding petitioner's case. Simply holding that petitioner's

> "[jury was] authorized to find, consistently with the United States Supreme Court's holding in Godfrey, that beyond a reasonable doubt the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhuman."

Spraggins v. State, 271 S.E.2d at 830 (emphasis added), the Georgia Supreme Court reimposed the death sentence.

That disposition of the remand was improper, however, since it effectively deprived petitioner of a trial by a jury that was actually given guidance about the meaning of subsection (b)(7) of the Georgia statute. That subsection permits the jury to recommend a death sentence if they find that the murder was aggravated in that it was:

> "outrageously and wantonly vile, horrible an inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim."

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* The plurality insisted that "if a State wishes to authorize the capital punishment...[i]t must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. at 428.

While it is true that in light of Godfrey and subsequent decisions by the Georgia Supreme Court, subsection (b)(7) has acquired some shape and texture, no trial jury has had the opportunity to consider petitioner's case in that crafted posture. Thus, it is "impossible for the Georgia Supreme Court to say whether a particular jury...so exercised its discretion", Godfrey v. Georgia, 446 U.S. at 437 (Marshall, J., concurring), and applied a constitutionally limited interpretation to (b)(7). Nothing in the sentencing instruction given petitioner's jury

> "implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed."

Godfrey v. Georgia, 446 U.S. at 428.

This Court has repeatedly held that no criminal sentence may be based merely on appellate speculation that a jury, faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis.* This principle has been observed in death cases, where the Court has insisted that all "doubts...should be resolved in favor of the accused." Andres v. United States,

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* Stromberg v. California, 283 U.S. 359, 268 (1931), Williams v. North Carolina, 317 U.S. 287, 291-93 (1942), Cramer v. United States, 325 U.S. 1, 36 n.45 (1945), Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949). Yates v. United States, 354 U.S. 298, 311-12 (1957), Gregory v. Chicago, 394 U.S. 111, 113 (1969), Street v. New York, 394 U.S. 576, 586-87 (1969), Bachellar v. Maryland, 397 U.S. 564, 569-71 (1970), Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam), Sandstrom v. Montana, 442 U.S. 510, 526 (1979), Chiarella v. United States, 445 U.S. 222, 237 N.21 (1980).

333 U.S. 740, 752 (1948); accord, Calton v. Utah, 130 U.S. 83, 86-87 (1889). Without assurance that the jury which sentenced the petitioner did so on the basis of a statute carefully fashioned to prevent arbitrary and capricious decisions, the petitioner's sentence to death should not have been reimposed.*

B. The Jury Which Sentenced Petitioner Was Given License to Apply the Statute Subjectively and Capriciously

In Gregg v. Georgia, 428 U.S. at 201, this Court considered the question of whether Georgia's seventh statutory aggravating circumstance was "so broad that capital punishment could be imposed in any murder case." The Court, obviously expecting future definition of this provision, concluded that:

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But the language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

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* The Georgia Supreme Court, acting on its own, could not constitutionally reimpose such a sentence simply from its own review of the trial record. "To conform to due process of law, petitione[r] [was] entitled to have the validity of his [conviction] appraised on consideration of the case as it was tried and as the issues were determined in the trial court". Cole v. Arkansas, 333 U.S. 196, 201 (1948); accord, Chiarella v. United States, supra, 445 U.S. at 237; Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). This "fundamental princip[e] of procedural fairness appl[ies] with no less force at the penalty phase of a trial in a capital case than...in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349 (1977)", Presnell v. Georgia, 439 U.S. 14, 16 (1978). The Georgia Supreme Court's attempt to reassess petitioner's sentencing issues, relying only upon a cold record, and in absence of statutory authority, plainly denied petitioner the due process of law.

Unfortunately, contrary to the Court's expectations, no such definition was forthcoming from the Georgia Supreme Court until Godfrey v. Georgia, supra. Before that decision, juries, virtually unguided by the courts of Georgia,* have found that the seventh aggravating circumstance obtained in cases as diverse as Banks v. State, 237 Ga. 325, 227 S.E. 2d 380, 382 (1976), cert. denied, 430 U.S. 975 (1977), where the firing of two gunshots into a victim found to constitute torture and depravity of mind,** and Thomas v. State, 240 Ga. 393, 242 S.E. 2d 1 (1977), where the victim was shot five times in the head, beaten with a shovel and hammer and buried alive.

Besides its objectionable breadth, Georgia's seventh aggravating circumstance, unrefined as it is, puts a premium on the introduction of inflammatory evidence. Gruesome and detailed testimony accompanied by flagrant exhibits acquires a heightened significance inappropriate to the objective and rational judgment which must inform the decision of whether a human life should be taken or spared. For instance, as discussed above, the admission into evidence of photographs which graphically depicted former testimony had no objective value, its only purpose was

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* The sentencing trial judge in peitioner's case made no attempt to define the seventh statutory aggravating circumstance in his instructions to the jury. (Appendix E)

** Apparently, where death is not simultaneous with the first intrusion of the victim's body, juries in Georgia are free to conclude that torture was entailed. See also, Morgan v. Georgia, 241 Ga. 485, 246 S.E. 2d 198 (1978), where one gunshot fired into the head of the victim was found to constitute the seventh statutory aggravating circumstance.

to elicit in the jury a visceral feeling of repulsion responsive to such vague standards as "wanton" and "vile."* Because this statutory standard, in its current undefined state, invites the death sentence as a function of inflammatory evidence, petitioner submits that it unconstitutional in that it does not in fact insure against the "wanton" and "freakish" imposition of the death penalty.

4. THE WRITTEN CHARGE OF THE TRIAL JUDGE EFFECTIVELY NULLIFIED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES

A. The Written Charge of the Trial Judge Failed to Inform the Jury that Even if They Found Aggravating Circumstances, They Could Recommend a Life Sentence.

As directed by statute the sentencing trial judge in this case provided the jury with a written charge to be taken into the jury room. Ga. Code Ann. §27-2534.1(c).** This written charge set forth two options which the jury might have selected after deliberation. The first option was stated as follows:

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* Indeed the trial judge admitted as much when he overruled the objections of petitioner's counsel to admission of the photographs. The judge said:

> Further, the state contends that murder was outrageous and wanton and vile, horrible, depravity of mind on the part of the defendant or aggravated battery on the victim so, I think, it is necessary these pictures be viewed by the jury in order that they can make up their minds as to what sentence this defendant is to receive upon the sentencing phase of the trial.

** The first sentence of Section 27-2534.1(c) reads:

> "The statutory instruction as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation."

> If you find that there was one or more of these aggravating circumstances (listed immediately above in the charge) established beyond a reasonable doubt, you may fix punishment at death.

The second option contained in the charge was:

> If you do not find that there was one or more aggravating circumstances, then the form of your verdict would be, "We, the Jury, fix punishment at life."

Although this charge was identical to the one disallowed by the Georgia Supreme Court in petitioner's first trial, the trial judge once again submitted the written charges to the jury in the resentencing hearing (Tr.-2 at 298).

Petitioner submits that by limiting the jury to these two options, the judge eliminated the possibility that the jury would consider mitigating circumstances and recommend a life sentence even if aggravating circumstances were present.

In the five death sentence cases decided by this Court in July, 1976, a consistent theme was that state death statutes must establish a scheme that allows the jury to consider and evaluate freely all mitigating circumstances in passing sentence.* The Court's more recent decision in Lockett v. Ohio, 438 U.S. 586 (1978), affirms that principle. At various places throughout these decisions, this Court approvingly referred to the Georgia statute, Code Ann. §27-2534.1, as exemplifying a state statute which comprehends the necessity of allowing the trier of fact to

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* Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas; 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280, Roberts v. Lousiana, 428 U.S. 325.

consider all mitigating circumstances.* See, e.g., Lockett v. Ohio, 538 U.S. at 606, Jurek v. Texas, 428 U.S. at 271.

In several decisions, the Georgia Supreme Court has considered the statute as applied by the lower Georgia courts and has set guidelines intended to ensure that the jury will consider mitigating circumstances and fashion their sentences accordingly. For instance, in Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977), the Georgia Supreme Court overturned a death sentence on the grounds that the trial judge failed to inform the jury that "they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance." 240 S.E. 2d at 40. Explaining its decision in terms of an obligation to permit consideration of mitigating circumstances, the Georgia Supreme Court wrote:

> Our system for deciding whether a death sentence is to be given requires the jury to consider two issues in the sentencing phase. First, the jury must consider if the state has proven the existence of at least one statutory aggravating circumstance (Code Ann. §27-2534.1(b)(1-10)), beyond reasonable doubt. Second, if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant and determine whether the death penalty is appropriate in this case.

240 S.E. 2d at 40-41. It is thus clearly the opinion of the

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* Section 27-2534.1(b) reads:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence....

Georgia Supreme Court that unless the jury is specifically informed that it may impose a sentence for life even if a statutory aggravating circumstance is present, effective consideration of mitigating circumstances will be foreclosed. See also, Hawes v. State, 240 Ga. 327, 240 S.E. 2d 833 (1977). Such an automatic negation of mitigating circumstances would of course rise to unconstitutional dimensions.

As noted in the factual summary above, the first Georgia Supreme Court decision involving the petitioner followed the Fleming and Hawes decision and set aside the death sentence. In contrast, in the second sentencing decision, the Georgia Supreme Court specifically found that the Fleming-Hawes infirmities did not obtain. Spraggins II, 252 S.E.2d at 622. Presumably relying upon parts of the judge's oral charge (Appendix D, hereto), the Georgia Supreme Court obviously believed that the jury was sufficiently informed that a death sentence was not inevitably to derive from a finding of aggravating circumstance. Petitioner submits that in light of the written charge actually carried by the jury into its final deliberations, the Georgia Supreme Court was incorrect in its conclusion that the oral charge was sufficiently salient to instruct the jury on the Fleming-Hawes constitutional issue.

Petitioner appreciates that the jury deliberation process is largely inscrutable. For the most part, the devices which sway juries or the tactics which pass beyond them are matters of mere speculation to observers. Nevertheless, the impact of a written charge carried into the

jury room as a tangible item of authoritative source cannot be minimized. To assume that several sentences in an earlier oral charge will cause the jury to deviate from the instructions of the written word is both naive and, more importantly, improper. Petitioner submits that the jury which sentenced him to death was effectively forclosed from consideration of mitigating circumstances because the judge's written charge failed to inform them that even if they found an aggravating circumstance, a life sentence could be imposed. Accordingly, petitioner was denied his constitutional right to due process of law.

Moreover, because the written charge overshadowed the oral charge and firmly guided the jury, the statute, in the understanding of the jury, would tend to acquire a mandatory character. For, once the jury found on aggravating circumstance, there was, under the judge's written instructions, no explicit option to death; and although the language in the written charge is technically permissive (the charge says "may recommend"), the jury members are not trained in law and their interpretation may not have been so refined. To the extent that this written charge turned the Georgia statute into a mandatory death statute, petitioner's constitutional rights were violated. See, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976).

B. The Written Charge of the Trial Judge Failed to Instruct the Jury that They Could Consider Mitigating Circumstances.

The judge's written charge, discussed above, also contained the following instruction concerning the scope of the jury's inquiry:

I charge you that you may look to see if there was any one or more of the following aggravating circumstances:

(1) The offense of murder was committed while the offender was engage in the commission of an additional capital felony, to wit: the rape of Frances Coe.

(2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity or mind on the part of the defendant, or an aggravated battery to the victim.

The written charge did not advise the jury that they could consider any mitigating circumstances.

With respect to the absence in the written charge of any reference to mitigating circumstances, the Georgia Supreme Court evidently believed, as suggested above, that the judge's oral charge regarding mitigating circumstances satisfied the constitutional requirements. If the Georgia Supreme Court did not so believe, there is no way to reconcile the decision in petitioner's case with the holding in Hawes v. State. Petitioner accordingly reiterates the points raised above regarding the respective influence on the jury of any oral and written charge and asks the Court to consider whether or not the sentencing jury was ultimately given sufficient notice and opportunity to consider mitigating circumstances.

In addition, the petitioner submits that the written charge was improper and unconstitutional because by its application it violated the Georgia statute, found lawful on its face by this Court in Gregg, which calls for an identity of content in the oral and written charges. Ga. Code Ann. §27-2534.1(c). That section requires that the

judge in the sentencing trial provide the jury "in charge and in writing" (emphasis added) with "the statutory instructions as determined by the trial judge to be warranted by the evidence."* The statutory language does not leave room for a significant disparity between the oral and written charges, particularly where the actual written charge omits any mention of mitigating circumstances. Such disparity could only serve to confuse the jury as to which factors it is required to consider and thus confounds the statute's finely-tuned guidance that this Court found so salutary in Gregg. Petitioner therefore submits that the exact terms of the statute which support its constitutionality by unqualifiedly guaranteeing consideration of mitigating circumstances, have been nullified in application by the disparity in the judge's oral and written charges.

5. FAILURE OF PETITIONER'S COUNSEL TO PROVIDE EFFECTIVE ASSISTANCE VIOLATED HIS SIXTH AMENDMENT RIGHTS.

Petitioner is entitled to reasonably effective assistance of counsel at both the guilt-innocence and sentencing stages of his trial under Section 2-101 and 2-111 of the Constitution of 1976 of the State of Georgia, and under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States. The Sixth Amendment

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* The "statutory instructions" referred to in Section 27-2534.1 (c) have already been cited in the petition, at p. 2. They are that "he (the judge) shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances....

right to counsel is satisfied only when an accused is provided "effective counsel" -- that is, "counsel reasonably likely to render, and rendering, reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638, 639, 203 S.E.2d 515, 517 (1974). Moreover, in capital cases, the Eighth Amendment, together with the Sixth and Fourteenth, establish a particularly high standard of reasonableness and require that a convicted defendant's counsel be subject to the strictest scrutiny. See e.g., Blake v. Zant, 513 F. Supp. 772, 779-781 (S.D. Ga. 1981); Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980); Smotherman v. Beto, 276 F. Supp. 579, 586 (N.D. Tex. 1967). See generally, Powell v. Alabama, 287 U.S. 45, 71-72 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Roberts v. Dutton, 358 F.2d 465, 471 (5th Cir. 1966). Indeed, this heightened scrutiny of defense counsel's services is one of the very conditions under which the Supreme Court has allowed capital punishment to be imposed. Woodson v. North Carolina, 428 U.S. 280, 306 (1976) (plurality opinion). As one court stated:

> The penalty of death is qualitatively different from a sentence of imprisonment.... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the jury's determination that death is the appropriate punishment in a specific case.... This necessary reliability is undermined unless it appears that the defendant received the competent assistance of an attorney acting as a diligent, conscientious advocate for his life.

State v. Myles, 389 So.2d 12, 30 (La. 1980) (citations omitted; emphasis added).

Petitioner submits that counsel was ineffective in failing to seek an independent psychiatric examination of his client and to introduce any testimony on behalf of his client during the special Plea of Insanity Hearing conducted. At both trials petitioner's court-appointed attorney neglected to conduct adequate voix dire examination of prospective jurors. At petitioner's resentencing trial the attorney failed to inquire of prospective jurors as to their knowledge of the first trial or as to its outcome. During the closing argument of the prosecution, the court-appointed counsel failed to object to statements made by the District Attorney in which the law was misstated, and which led the jury to believe that if petitioner was convicted on only one count of the indictment, the maximum penalty he could receive would be life imprisonment. (Tr.-1 at 124-125). During the closing argument by the petitioner's court-appointed attorney at the resentencing trial, the petitioner's attorney told the jury that he did not ask to represent the petitioner and was representing him only because he was court appointed. Further, counsel alluded to the fact that the jury's decision would be reviewed by the Georgia Supreme Court on appeal. (Tr.-2 at 289). If such comment had been made by the prosecution, it would have been grounds for a mistrial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Georgia Supreme Court, denying a writ of habeas corpus, herein.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-5084

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

EDDIE SPRAGGINS,

Petitioner,

-against-

WALTER D. ZANT, Warden,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Eddie Spraggins, by his undersigned counsel, respectfully requests leave to file the Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of fees and costs, and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court. Mr. Spraggins' affidavit in support of this motion is attached.

Howard S. Acker
Attorney for Petitioner
Eddie Spraggins

140 Broadway
New York, New York 10005
(212) 269-1100

Dated: New York, New York
July 16, 1982

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

EDDIE SPRAGGINS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, EDDIE SPRAGGINS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No X

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No X

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None X

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

X Eddie Spraggins

EDDIE SPRAGGINS

STATE OF GEORGIA
COUNTY OF _____

SUBSCRIBED AND SWORN TO
before me this the 20 day of May, 1982.

Notary Public

My Commission expires:
6-20-83